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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 38

COLGATE-PALMOLIVE-PEET COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 39

COLGATE-PALMOLIVE-PEET COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 10, 1943.

CERTIORARI GRANTED JUNE 14, 1943.

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[fol.1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Appellant's Brief

PORTIONS of RECORD—Appeal No. 7791

IN UNITED STATES DISTRICT COURT for DISTRICT of DELAWARE

JUDGMENT—April 23, 1941

And now to-wit this 23rd day of April, A. D. 1941, this cause having come on to be heard upon the pleadings filed herein and the Stipulation of Facts filed with the Court on the 27th day of June, A. D. 1940, and having been argued by Counsel for the respective parties and maturely considered by the Court, it is, upon motion of Stewart Lynch, United States Attorney for the District of Delaware,

Ordered, adjudged and decreed by the court that the complaint filed in this cause be and the same is hereby dismissed with costs to the Defendant and against the Plaintiff to be taxed by the Clerk.

John P. Nields, J.

IN UNITED STATES DISTRICT COURT

OPINION—March 20, 1941

These suits are for the recovery of Internal Revenue taxes alleged to have been illegally assessed and collected, together with interest. The suits are based on Sec. 24, Par. 20 of the Judicial Code, as amended (28 USCA 41 (20)).

The subject of the tax is the processing or use of coconut oil, palm oil, palm kernel oil and sunflower seed oil, hereinafter referred to as "oils." Cocoanut Oil is made from products grown in the Philippine Islands. This tax is imposed by section 602½, c. 277, of the Revenue Act of 1934 (48 Stat. 680).

[fol.2] In suit No. 2 plaintiff seeks to recover $1,476,507.81 paid as tax on the processing or use of oils from

May 10, 1934 to April 31, 1935, with interest. In suit No. 58 plaintiff seeks to recover $885,874.56 paid as tax on the processing or use of oils from May 1, 1935 to January 31, 1937, with interest. The two suits are consolidated for trial. The material facts are stipulated.

Plaintiff is a Delaware corporation with its principal office and place of business in Jersey City, New Jersey. It manufactures and sells soaps and other products. In that manufacture it uses coconut oil and the other oils. May 10, 1934, the effective date of section 602½, plaintiff had on hand 78,746,079 pounds of oil (49,216,927 pounds of oil covered in suit No. 2 and the balance of 29,529,152 pounds covered in suit No. 58). Before that date these oils had been processed one or more times in the United States. After that date these oils were subjected to further processing or uses by plaintiff in the manufacture of articles for sale. Plaintiff reported the amounts of oils processed and paid a processing tax with respect to the first processing occurring after May 10, 1934. Such taxes were paid under protest. Claims for refund were filed and rejected by the Commissioner.

Section 602½ of the Revenue Act of 1934 imposing a "processing Tax on Certain Oils" provides in part:

"(a) There is hereby imposed upon the first domestic processing of cocoanut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sen- [fol. 3] tence) a tax of 2 cents per pound, to be paid by the processor, upon the first domestic processing of cocoanut oil or of any combination or mixture containing a substantial quantity of cocoanut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such cocoanut oil (whether or not contained in such a combination or mixture), * * *. All taxes collected under this section with respect to cocoanut oil wholly of Philippine production or produced from materials

wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at anytime the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, cocoanut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

This case turns upon whether "first domestic processing" in section 602½ means the first domestic processing occurring after the enactment of the statute.

Section 602½ of the Revenue Act of 1934 became effective May 10, 1934. It imposes a processing tax upon the first domestic processing of said oils, or of any combination or mixture containing a substantial quantity of any one or more of such oils where there has been no previous first [fol. 4] domestic processing with respect to any one of such oils. The section defines the term "first domestic processing" to mean "the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, * * *."

By section 602 (f) of the Revenue Act, all provisions of law respecting taxes imposed by section 600 of the Revenue Act of 1926 are made applicable to the taxes imposed by section 602½. Under section 1101 of the Revenue Act of 1926 the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized to prescribe and publish all needful rules and regulations for the enforcement of the processing tax act. August 17, 1934 the Commissioner promulgated regulations 48 relating to the processing tax on the oils under section 602½. Article (1) of regulations 48 provides:

"(1) First domestic processing means the first use in the United States on or after the effective date of the Act. At all times in these regulations, the term processing or first domestic processing will be deemed to be synonymous with 'use' or 'first use in the United States on or after

the effective date,' respectively, and will include the meanings implied in the latter terms by subdivision (k), above."

The claims for refund contain the following statements:

"On the effective date of said Act taxpayer had on hand certain palm oil, cocoanut oil, palm kernel oil and sunflower oil which had, prior to said date, been bleached and/or refined in the United States in the manufacture or production of an article intended for sale. Such bleaching and/or refining in the United States prior to said date constituted the first domestic processing of such oils within the [fol. 5] contemplation of said Section 602½ and any subsequent processing or use of said oils was not subject to the tax imposed by said Section. The tax has been assessed and collected from the taxpayer with respect to the subsequent processing or use each month of such bleached and/or refined oils and taxpayer has heretofore filed with the Collector of Internal Revenue, Fifth District of New Jersey, a protest each month against the payment of said tax on such oils, * * *."

The claims also contained the following statement:

"Regulations 48 issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury construe the term 'first domestic processing' as used in Section 602½ to mean, with respect to said oils not previously taxed, any use in the United States on and after the effective date of the tax in the manufacture of an article for sale, notwithstanding that said Section in explicit language defines said term to mean the 'first use in the United States in the manufacture or production of an article intended for sale,' etc. Any attempt to broaden the scope of said Section by said regulations is wholly unwarranted, illegal and void."

These claims for refund were rejected by the Commissioner. The grounds alleged in the complaints follow the grounds asserted in the claims for refund.

Laws refer only to transactions occurring after their enactment, unless they expressly provide otherwise. This is a well settled rule. Applying the rule to the facts of this case, it is clear that in levying a tax on the "first domestic processing" of the oils section 602½ refers to

the first domestic processing occurring after the section became law. This deduction follows from considering the [fol. 6] vital words of the statute alone.

The meaning of section 602½ appears free from doubt. However, if an interpretation of its meaning is required, that interpretation has been furnished by the Commissioner in his regulations. This interpretation has been approved by the Congress. The parties have agreed that the oils in question were domestically processed before the effective date of the act and also domestically processed after the effective date of the act. The question recurs: Does the word "first" mean the first domestic processing in point of fact whether before or after the effective date of the act or the first domestic processing after the effective date of the act regardless of prior processings.

Every statute operates on future acts unless a contrary intent is expressly declared. The Supreme Court has so stated in an unbroken line of cases from the earliest days to the present,

"* * * a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; * * *."

Hassett v. Welch, 303 U. S. 303, 314.

Thus, when section 602½ levies a tax upon a "first" processing, the first processing after its effective date is subject of the tax. The statute does not concern itself with what occurred before its effective date. Processing the oil before the effective date did not change the identity of the oil. It was still oil susceptible of processing. The rule of interpretation of taxing statutes is:

"Conceding the rule of interpretation of taxing statutes to be that in case of doubt they are to be construed more strictly against the government and in favor of the taxpayer, * * * still the language used must be given its usual [fol. 7] and ordinary meaning, keeping in mind the subject-matter to which it relates. It can not under the rule of interpretation be strained beyond the breaking point in the interest of taxpayers. * * * (nor) beyond the sense in which it was used by Congress." Merriman v. Commissioner of Internal Revenue (1 Cir.) 55 F. (2) 879.

The last part of the first sentence of section 602½ provides that the tax is imposed upon the processing "of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which

oils there has been no previous first domestic processing". Congress had two purposes in view: (1) to defeat avoidance of the tax and (2) to avoid double taxation. In the absence of this provision it would have been easy for exporters or domestic processors to mix the oil with some other product and to contend that the mixed article processed was not oil since it contained other ingredients. Moreover the same oil might be taxed twice—first when first domestically processed as oil and second when in a combined or mixed form. To correct these objections the mixtures to be taxed were confined to those containing oil where there had been no previous first domestic processing. The Second Circuit held that previous "first" meant previous "taxable" and that the use of the word "first" in the section obviously meant the first domestic processing occurring after the effective date of the act rather than the first processing in point of fact in the United States. Loose-Wiles Biscuit Co. v. Rasquin (2 Cir.) 95 F. (2) 438. Cert. denied 305 U. S. 611.

Subsection (e) of section 602½ provides that if any person prior to January 26, 1934, had made a bona fide contract for the sale of any article on or after the effective date of [fol. 8] section 602½ wholly or in chief value of an article with respect to which the tax was imposed, and if such contract did not permit the addition to the amount to be paid thereunder of the whole of such tax then, unless the contract expressly prohibited such addition, the buyer should pay so much of the tax as was not permitted to be added to the contract price. Taxes payable by the buyer in such circumstances were to be paid to the seller at the time the sale was consummated and were to be paid over by the seller to the United tSates. It is thus evident Congress intended that oils already in the country as well as oils to enter the country should not escape the tax.

The regulations of the Commissioner of Internal Revenue interpreting section 602½ are valid. The commissioner has authority to construe and issue formal regulations construing internal revenue laws passed by Congress. Brewster v. Gage, 280 U. S. 327. Mass. Mutual Life Ins. Co. v. United States, 288 U. S. 269. Faweus Machine Co. v. United States, 282 U. S. 375. Since the issuance of Regulations 48 Congress has three times enacted legislation directly relating to this tax without disapproving the treasury in-

terpretation and application of the tax to the first domestic processing occurring after the effective date of section 602½. In fact, Congress has enacted four revenue acts, since the revenue act of 1934, in three of which section 602½ was specifically amended without any indication that Congress disapproved the Commissioner's regulations relative to section 602½. On the contrary, the qualifying amendment in section 702(a) of the 1936 act indicates specific approval and adoption of the Commissioner's interpretation.

Each complaint must be dismissed.

(Signed) John P. Nields, J.

March 20, 1941.

[fol. 9] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Jan. 25, 1938. Petition of Plaintiff filed.

Jan. 25, 1938. Affidavit of Eugene Ennalls Berl as to service filed.

Mar. 26, 1938. Motion by United States Attorney filed; same day order granting leave to appear specially, &c; same day order filed.

Apr. 15, 1938. Defendant appears by John J. Morris, Jr., U. S. Attorney; same day praecipe filed.

May 17, 1938. Answer filed.

June 27, 1940. Trial before the court.

June 27, 1940. Stipulation as to facts filed.

Oct. 4, 1940. Hearing on pleadings and proof.

Mar. 20, 1941. Opinion of Court filed.

Apr. 23, 1941. Final decree that complaint be dismissed with costs against plaintiff; same day decree filed.

July 19, 1941. Plaintiff's notice of appeal with bond for costs in the sum of $250.00, with Indemnity Insurance Company of North America, as surety filed.

July 19, 1941. Copy of notice of appeal mailed to Stewart Lynch, Esq., U. S. Attorney, attorney for defendant-appellee.

Aug. 7. 1941. Stipulation as to contents of record on appeal, filed.

Aug. 27, 1941, Transcript of record certified and mailed to Clerk, U. S. Circuit Court of Appeals.

[fol. 10] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—June 27, 1940

The parties hereto through their respective Attorneys stipulate the following facts for the purpose of this suit, and for no other purpose.

1. Plaintiff is and at the times mentioned in the complaint was a corporation of the State of Delaware and a resident and citizen of said State, and has its principal office and place of business in the City of Jersey City, State of New Jersey. It is and was at the times mentioned in the complaint engaged in the business of manufacturing and selling soaps and other products in the manufacture of which it used Palm Kernel Oil, Sunflower Seed Oil, Palm Oil and Coconut Oil (which oils are hereinafter sometimes referred to as "said oils"), the last mentioned oil being of Philippine origin or made from products grown in the Philippine Islands.

2. This is a suit of a civil nature at common law, arising under the Internal Revenue Laws of the United States, and the amount in controversy exceeds the sum or value of $3,000. exclusive of interest and costs. It is a suit against the United States of America for recovery of certain oil processing taxes alleged by plaintiff to have been erroneously and illegally assessed and collected under Section 602½ of Title IV of the Revenue Act of 1934 which became effective May 10, 1934, at 11:40 A. M. Eastern Standard Time.

3. Said taxes were paid under protest in the amounts and at the times hereinafter set forth to the Collector of Internal Revenue for the Fifth District of New Jersey. Said Collector of Internal Revenue was not in office at the time this suit or proceeding was commenced.

[fol. 11] 4. This Court has jurisdiction of this suit pursuant to paragraph 20 of Section 24 of the Judicial Code as amended (28 U. S. C. A. 41 (20)).

5. As shown on the attached Schedule A which is hereby made a part hereof, between May 10, 1934, at 11:40 A. M. (E.S.T.), the effective date of Section 602½ of Title IV of the Revenue Act of 1934, and May 31, 1935, plaintiff, pursuant to the requirements of Regulations 48 issued by the

Commissioner of Internal Revenue and approved by the Secretary of the Treasury, paid, under protest, taxes aggregating $1,476,507.81 with respect to the usage, month by month, during the period May 10, 1934, to April 30, 1935, of various processed forms of Coconut Oil, Palm Oil, Palm Kernel Oil and Sunflower Oil, which said oils had, prior to said effective date of Section 602½, been subjected in the United States to one or more of the domestic processings hereinafter described in the manufacture or production of an article or articles intended for sale. Said Schedule A shows the aggregate pounds of said oils (combining the several oils, Coconut, Palm, Palm Kernel and Sunflower) according to the processed form in which said oils were on the effective date of said Section 602½, and shows the respective monthly usages thereafter of such processed forms of said oils, together with the total amount of the tax paid under protest with respect to each month's usage thereof, and the respective dates of payment opposite the respective amounts.

6. The aggregate of 17,293,779 lbs. of refined oils (refined Sunflower Oil, Refined Palm Kernel Oil and Refined Coconut Oil) shown on Schedule A under the column headed "Refined" had been obtained, prior to the effective date of [fol. 12] said Section 602½, by subjecting in the United States the crude oils to the well-known commercial process of refining which is in common use and is generally referred to as the "Caustic Soda Process," which process is described as follows: The operation consists of adding to a known quantity of crude oil (Coconut, Palm Kernel or Sunflower Oil, as the case may be) a solution of caustic soda or solutions of caustic soda and salt, the amount and concentration of which are computed from a laboratory determination of the free fatty acid content of the crude oil. The crude oil is heated to a predetermined temperature and while the heated oil is being agitated mechanically or by means of compressed air, the caustic solution is added. The agitation is continued until the operator, by examining samples, observes that the "Foots" show a clean break and settle rapidly, whereupon the agitation is stopped and the contents are allowed to settle. After settling and as a result of this process, two products are obtained, viz: a supernatant layer of clear oil which is commonly known and referred to as "Refined Coconut Oil," or "Refined Palm

Kernel Oil," or "Refined Sunflower Oil" and the lower layer consisting of what is generally known as "Foots." An experienced operator can tell, from observing the samples during the refining process, when the mixture is in condition to separate properly and yield the maximum of refined oil. However, samples were sent to the laboratory for testing as to color and free fatty acid content of the Refined Coconut Oil, Refined Palm Kernel Oil or the Refined Sunflower Oil. The refined oil produced in such refining process is a different product from the crude oil, the refined oil being much lighter in color than the crude oil and being substantially free from free fatty acid.

[fol. 13] 7. The said 17,293,779 lbs. of refined oils were subsequently processed or used by plaintiff in the United States after the effective date of said Section 602½ in the respective quantities and during the respective months indicated on said Schedule A, and the tax at the rate of 3 cents per pound was paid under protest by plaintiff on the dates indicated on said Schedule A with respect to such subsequent processing or usage by plaintiff.

8. The lower layer resulting from the above process, commonly referred to and known as "Foots", is a different product from the crude oil originally put into the process; the Foots are darker in color than either the original crude oil or the refined oil and consist of a semi-solid mass of soap, water, some refined oil in emulsified coloring and other organic matter removed from the crude oil in the refining process.

9. The 1,972,373 lbs. of Foots shown on Schedule A under the column headed "Foots" represent the product obtained in the lower layer from the subjection of said oils to the refining process described in Paragraph 6 hereof and were obtained from such refining process carried on in the United States prior to the effective date of said Section 602½ of Title IV of the Revenue Act of 1934. Such Foots were subsequently processed or used in the United States after the effective date of said Section 602½ in the respective quantities and during the respective months indicated on said Schedule A and the tax at the rate of 3 cents per pound was paid under protest by the plaintiff on the dates indicated on said Schedule A with respect to such subsequent processing or usage by the plaintiff.

10. The 11,056,088 lbs. of Refined Coconut Oil and Foots shown on Schedule A under the column headed "Refined [fol. 14] and Foots" had been produced, prior to the effective date of said Section 602½, by subjecting the crude Coconut Oil in the United States to the refining process described in Paragraph 6 hereof, but on that date the super-natant layer of clear, refined oil had not been transferred to the storage tanks but remained with the "Foots" in the tanks in which the refining process had been conducted, although there was then a clear separation between the Refined Oil and Foots.

11. Subsequent to the effective date of Section 602½, the number of pounds of Refined Coconut Oil and Foots shown under the column headed "Refined and Foots" in Schedule A hereof were further processed or used in the respective quantities and during the respective months as indicated on said Schedule A, and the plaintiff paid the tax under protest at the rate of 3 cents per pound with respect to such subsequent processing or usage, on the dates as indicated on said Schedule A.

12. The 18,312,632 lbs. of Bleached Palm Oil shown on Schedule A under the column headed "Bleached" had been obtained prior to the effective date of Section 602½, by subjecting crude Palm Oil in the United States to the well-known commercial process of bleaching, generally referred to as the "Air Bleaching Process". This process consists in the oxidation of certain coloring matters in the crude oil as the result of which a product different from the crude oil is obtained, which is lighter in color than the crude oil and is generally known and referred to as "Bleached Palm Oil". The "Air Bleaching Process" consists of heating the crude oil to a pre-determined temperature after which air is aspirated or blown through the heated oil until a sample shows the desired degree of bleaching. When the [fol. 15] operator judges the bleaching process complete a sample is tested by the laboratory to ascertain if the bleached oil conforms to the required specifications.

13. The Bleached Palm Oil in the respective quantities in pounds as shown under the column headed "Bleached" on Schedule A hereof was, subsequent to the effective date of said Section 602½ further processed or used by the plaintiff, in the respective months shown on said Schedule

and the plaintiff paid a tax, under protest, at the rate of 3 cents per pound with respect to such subsequent processing or use at the respective dates shown on said Schedule A.

14. Of the total Bleached Palm Oil which plaintiff had on hand on the effective date of said Section 602½ obtained by subjecting crude palm oil in the United States, prior to said effective date, to the Air Bleaching Process hereinabove described, said 18,312,632 lbs. thereof were so processed or used as aforesaid and 307,802 lbs. thereof were sold by plaintiff to other persons or corporations throughout the period May 10, 1934 to April 30, 1935 inclusive.

15. The 103,355 lbs. of Refined and Bleached Palm Oil shown on Schedule A under the column headed "Refined and Bleached" had been obtained, prior to the effective date of said Section 602½, by subjecting crude Palm Oil in the United States first, to the refining process described in Paragraph 6 hereof and secondly, to the Air Bleaching Process described in Paragraph 12 hereof. The Refined and Bleached Palm Oil is a different product from the crude Palm Oil from which it is made.

16. The respective quantities in pounds of said Refined and Bleached Palm Oil, shown under the column headed "Refined and Bleached" were, after the effective date of [fol. 16] said Section 602½ further processed or used by plaintiff in the respective months shown on said Schedule A, and the plaintiff paid, under protest, a tax at the rate of 3 cents per pound with respect to such subsequent processing or usage on the dates indicated in the said Schedule A.

17. The 336,798 lbs. of Refined, Dehydrated and Bleached Coconut Oil shown on Schedule A under the column headed "Refined, Dehydrated and Bleached" had been obtained, prior to the effective date of said Section 602½, by subjecting the crude Coconut Oil in the United States to the three following commercial processes:

(1) The refining process described in Paragraph 6 hereof;

(2) A dehydrating process which is carried out by heating the refined oil under vacuum in a dehydrating tank until the moisture is expelled; and

(3) A bleaching process consisting of adding a predetermined amount of a mixture of Fuller's earth and bleached

carbon to the Refined and Dehydrated Oil which has been heated to a pre-determined temperature and agitating the mixture mechanically until the desired color is obtained, after which the oil is pumped through a filter press to remove the bleaching materials.

In these processes, the operations are carefully controlled by chemical tests and definite specifications must be met before the product can be graded as Refined, Dehydrated and Bleached Coconut Oil. The Refined, Dehydrated and Bleached Coconut Oil is a different product from the crude Coconut Oil from which it is made.

[fol. 17] 18. The said 336,798 lbs. of Refined, Dehydrated and Bleached Coconut Oil were, after the effective date of said Section 602½, subjected in the United States to further processing or usage by plaintiff and plaintiff paid a tax, under protest, at the rate of 3 cents per pound with respect to such further processing or usage of said Refined, Dehydrated and Bleached Oils during the respective months on the dates shown on said Schedule A.

19. Of the total Refined, Dehydrated and Bleached Coconut Oil which plaintiff had on hand on the effective date of said Section 602½, obtained by subjecting crude Coconut Oil in the United States, prior to said effective date, to the three processes above described in Paragraph 17 hereof, said 336,798 lbs. were so processed or used as aforesaid and 61,200 lbs. thereof were sold by plaintiff to other persons or corporations throughout the period May 10, 1934 to April 30, 1935 inclusive.

20. The 139,463 lbs. of Refined, Bleached, Dehydrated and Deodorized Coconut Oil shown on Schedule A under the column headed "Refined, Bleached, Dehydrated and Deodorized" had been obtained, prior to the effective date of said Section 602½, by subjecting the crude coconut oil in the United States to the three processes described in Paragraph 17 hereof and in addition thereto, had been subjected to a fourth commercial process commonly known as the "Deodorizing Process." This process consists of heating the Refined, Dehydrated and Bleached Coconut Oil to a pre-determined temperature after which it is drawn into a closed vessel or deodorizer which has been evacuated, and the deodorization is carried out by blowing super-heated

steam through the heated oil until the desired degree of deodorization has been obtained, after which said oil is [fol. 18] drawn into a cooler where the heat is extracted by water circulated through closed coils. When cooled to the desired temperature this deodorized oil is pumped through a filter for clarification. Particular skill is required in producing this grade of oil which must conform to the trade specifications for edible oil with respect to color, odor, taste and free fatty acid content. This processed oil, known in the trade as "Refined, Bleached, Dehydrated and Deodorized Coconut Oil" cannot be graded as such until after chemical tests in the laboratory, and it is a very different product from the crude Coconut Oil originally put into the processes.

21. The said 139,463 lbs. of Refined, Bleached, Dehydrated and Deodorized Coconut Oil shown on Schedule A under the column headed "Refined, Bleached, Dehydrated and Deodorized" were, after the effective date of said Section 602½, subjected in the United States to further processing or usage by plaintiff and plaintiff paid the tax, under protest, at the rate of 3 cents per pound with respect to such further processing or usage of said oil in the respective months and on the dates shown on said Schedule A.

22. Of the total Refined, Bleached, Dehydrated and Deodorized Coconut Oil which plaintiff had on hand on the effective date of said Section 602½, obtained by subjecting crude Coconut Oil in the United States prior to said effective date, to the four processes hereinabove described, 139,463 lbs. thereof were subsequently processed or used by plaintiff as aforesaid; and 241,921 lbs. thereof were sold by plaintiff to other persons or corporations from time to time during the period May 10, 1934 to April 30, 1935 inclusive.

23. The 2,439 lbs. of Scrapol shown on Schedule A under the column headed "Scrapol" had, prior to the effective [fol. 19] date of said Section 602½, been subjected in the United States to the three processes described in Paragraph 17 hereof and was recovered from the filter press cake formed when the processed oil is pumped through a filter press, as described in said Paragraph 17. The filter press cake contains some recoverable oil and is blown with steam and air to recover this processed oil which is designated on the records of the plaintiff as "Scrapol." The said 2,439

lbs. of Scrapol was, after the effective date of said Section 602½ and during the month of May, 1934, subjected to a further processing or usage and the plaintiff paid, under protest, the tax at the rate of 3 cents per pound with respect to such further processing or usage of said Scrapol on the date shown on said Schedule A, viz., July 31, 1934.

24. The processed forms of oils hereinbefore referred to and upon the subsequent processing of which were levied the taxes herein sought to be recovered, continued to be oils in their respective processed forms as hereinabove stated, up to and at the time when they were used as aforesaid after the effective date of Section 602½, said subsequent usage being in each case a use in the manufacture or production of an article or articles intended for sale.

25. Generally, though not always, after each processing of any of said oils, the resulting products were drawn from the processing tanks by plaintiff and were pumped to storage tanks where the respective processed forms of that particular oil were stored for subsequent usage or sale. When the resulting products had not been transferred to their respective storage tanks on or prior to the effective date of said Section 602½ and were not stored separately, plaintiff's records and Schedule A hereof show the quantities of the respective products combined as one item; for example, [fol. 20] where the Refined Oil and Foots both remained in the same tank on the effective date of said Section 602½, although there was then a clear separation of the two, plaintiff deemed it expedient, from an accounting standpoint, to combine both items in one account as "Refined Oil and Foots" to which reference has heretofore been made in Paragraph 10 hereof.

26. On September 25, 1935 plaintiff duly filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey, a claim for refund of the taxes paid as aforesaid, plus interest thereon, a true copy of an excerpt therefrom setting forth the basis of said claim being hereto attached and made a part hereof as Schedule B. Said claim for refund was rejected in full by the Commissioner of Internal Revenue on January 27, 1936 and this suit was thereafter timely instituted.

27. If plaintiff is entitled to recover herein, it is entitled to recover from the defendant the sum of $1,476,507.81

plus interest at the rate of six per cent per annum until payment, on the following sums:

On $240,980.64 from July 31, 1934
On $112,712.91 from August 30, 1934
On $153,444.03 from September 29, 1934
On $159,240.75 from October 30, 1934
On $204,164.70 from November 27, 1934
On $134,235.93 from December 29, 1934
On $115,777.23 from January 24, 1935
On $73,269.06 from February 27, 1935
On $76,461.09 from March 28, 1935
On $99,040.83 from April 26, 1935
On $107,180.64 from May 25, 1935

[fol. 21] 28. In administering Section 602½ of the Revenue Act of 1934, the Commissioner of Internal Revenue has always construed said Section to mean that the liability for the tax accrues during the month when the first processing after May 10, 1934, in the United States of the specified oils occurred, in the manufacture of an article intended for sale, irrespective of whether such manufacture was completed during the month of such first processing or whether further processings in such manufacture were necessary and occurred during subsequent months.

29. It is understood and agreed that the facts hereinabove stipulated constitute the entire proof to be offered in this case, provided, however, that in stipulating said facts neither party admits the competency, relevancy or materiality of any of such facts, but each party reserves the right to object to the competency, relevancy or materiality of any stipulated fact, and if any such objection is sustained by the Court the other party shall be at liberty, for purposes of the record, to offer oral testimony or other proof in lieu of the stipulated fact or facts so stricken by the Court.

E. Ennalls Berl, Attorney for Plaintiff. Stewart Lynch, Attorney for Defendant.

Dated: June 27, 1940.

(Here follows one paster, folio 22))

[fol. 22]

SCHEDULE "A" TO STIPULATION OF FACTS

Colgate-Palmolive-Peet Company

Table Showing Month by Month Usage in Pounds Between May 10, 1934, at 11:40 A. M., E. S. T. and April 30, 1935, of Processed Forms of Vegetable Oils (Coconut, Palm, Palm-Kernel and Sunflower) Which Oils Had Been Domestically Processed Prior to the Effective Date of Section 602½ of the Revenue Act of 1934; the Tax Paid Under Protest by Plaintiff with Respect to Such Subsequent Usage, and the Respective Dates of Payment Thereof, the Quantities in Pounds of the Various Oils Are Combined and Grouped According to the Processed Form Thereof.

Period		Refined	Foots	Refined & Foots	Refined and Bleached	Bleached	Refined, Dehydrated & Bleached	Refined Bleached, Dehydrated & Deodorized	Scrapol	Total Used	Tax Paid	Date of Payment
1934	May	2,007,171	209,613	310,903	44,115	1,145,753	319,678	127,824	2,439	4,167,496	$125,024.88	7-31-34
	June	1,689,490	493,920	649,691	780	1,003,001	17,120	11,190		3,865,192	115,955.76	7-31-34
	July	2,104,143	31,196	435,962	58,460	1,126,887		449		3,757,097	112,712.91	8-30-34
	Aug.	2,093,976	39,988	1,135,932		1,844,905				5,114,801	153,444.03	9-29-34
	Sept.	2,132,751	none	1,506,837		1,668,437				5,308,025	159,240.75	10-30-34
	Oct.	3,393,161	98,638	1,089,790		2,223,901				6,805,490	204,164.70	11-27-34
	Nov.	2,232,455	128,651	693,294		1,420,131				4,474,531	134,235.93	12-29-34
	Dec.	1,082,905	351,590	799,128		1,625,618				3,859,241	115,777.23	1-24-35
1935	Jan.	407,214	291,043	783,051		960,994				2,442,302	73,269.06	2-27-35
	Feb.	150,513	189,153	1,029,785		1,179,252				2,548,703	76,461.09	3-28-35
	Mar.	none	138,581	1,614,637		1,548,143				3,301,361	99,040.83	4-26-35
	Apr.	none	none	1,007,078		2,565,610				3,572,688	107,180.64	5-25-35
		17,293,779	1,972,373	11,056,088	103,355	18,312,632	336,798	139,463	2,439	49,216,927	$1,476,507.81	

[fol. 23] SCHEDULE B. TO STIPULATION OF FACTS

II—Refund of the Tax Assessed and Collected Upon the Subsequent Use of Oils First Domestically Processed Prior to the Effective Date of the Act, viz., May 10, 1934, at 11:40 A. M.

Regulations 48 issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury construe the term "first domestic processing" as used in Section 602½ to mean, with respect to said oils not previously taxed, *any use in the United States on and after the effective date of the tax* in the manufacture of an article for sale, notwithstanding that said Section in explicit language defines said term to mean the "*first use in the United States* in the manufacture or production of an article intended for sale," etc. Any attempt to broaden the scope of said Section by said regulations is wholly unwarranted, illegal and void. No executive tribunal or official can constitutionally (either with or without the sanction of Congress) make any rule or regulation, the effect of which is to add to, take from, or otherwise change a statute. Such construction by the aforesaid Regulations 48 is simply an attempt by an Executive Officer or Department to write into the statute something which is not there.

On the effective date of said Act taxpayer had on hand certain palm oil, coconut oil, palm kernel oil and sunflower oil which had, prior to said date, been bleached and/or refined in the United States in the manufacture or production of an article intended for sale. Such bleaching and/or refining in the United States prior to said date constituted the first domestic processing of such oils within the contemplation of said Section 602½ and any subsequent processing or use of said oils was not subject to the tax imposed by said Section. The tax has been assessed and collected [fol. 24] from the taxpayer with respect to the subsequent processing or use each month of such bleached and/or refined oils and taxpayer has heretofore filed with the Collector of Internal Revenue, Fifth District of New Jersey, a protest each month against the payment of said tax on such oils, specifying in detail the amount of such oils so subsequently used and the tax paid thereon for each of the months during the period covered by this claim, viz., May 10, 1934 to and including April 30, 1935, to which protests

reference is hereby made. The taxes so assessed and paid upon such oils have been illegally and erroneously assessed and collected and taxpayer is entitled to a refund thereof, with interest.

Attached hereto, marked "Exhibit 2" and made a part hereof, is a schedule by months showing the total taxes paid by the taxpayer to said Collector of Internal Revenue under Section 602½, with the dates of payment thereof and the amount of the taxes so erroneously assessed and collected, aggregating a total of $1,481,694.75. The taxpayer is entitled to a refund of said amount, with interest.

[fol. 25] IN UNITED STATES DISTRICT COURT

PORTIONS OF RECORD—APPEAL NO. 7792

JUDGMENT—April 23, 1941

And now to-wit this 23rd day of April, A. D. 1941, this cause having come on to be heard upon the pleadings filed herein and the Stipulation of Facts filed with the Court on the 27th day of June, A. D. 1940, and having been argued by Counsel for the respective parties and maturely considered by the Court, it is, upon motion of Stewart Lynch, United States Attorney for the District of Delaware,

Ordered, Adjudged and Decreed by the Court that the Complaint filed in this cause be and the same is hereby dismissed with costs to the Defendant and against the Plaintiff to be taxed by the Clerk.

John P. Nields, J.

IN UNITED STATES DISTRICT COURT

NOTE RE OPINION

The cases were consolidated below and but one opinion was written. It appears *ante*, page 1.

[fol. 26] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Aug. 1, 1939 Complaint filed; same day summons issued.
Aug. 1, 1939 Affidavit of E. Ennalls Berl as to service filed.
Aug. 3, 1939 Marshal returns on Summons "Served", &c.; same day writ filed.
Aug. 24, 1939 Defendant appears by Stewart Lynch, Esq., U. S. Attorney; same day præcipe filed.
Sept. 28, 1939 Answer filed.
June 27, 1940 Trial before the Court.
June 27, 1940 Stipulation as to facts filed.

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—June 27, 1940

The parties hereto through their respective Attorneys stipulate the following facts for the purpose of this suit, and for no other purpose.

1. Plaintiff is and at the times mentioned in the complaint was a corporation of the State of Delaware and a resident and citizen of said State, and has its principal office and place of business in the City of Jersey City, State of New Jersey. It is and was at the times mentioned in the complaint engaged in the business of manufacturing and selling soaps and other products in the manufacture of [fol. 27] which it used Palm Kernel Oil, Sunflower Oil, Palm Oil and Coconut Oil, (which oils are hereinafter sometimes referred to as "said oils") the last mentioned oil being of Philippine origin or made from products grown in the Philippine Islands.

2. This is a suit of a civil nature at common law, arising under the Internal Revenue Laws of the United States, and the amount in controversy exceeds the sum or value of $3,000, exclusive of interest and costs. It is a suit against the United States of America for the recovery of certain oil processing taxes alleged by plaintiff to have been erroneously and illegally assessed and collected under Section 602½ of Title IV of the Revenue Act of 1934 which became

effective May 10, 1934, at 11:40 A. M., Eastern Standard Time. Effective at 12:01 A. M., E. S. T., August 21, 1936, Section 702 of Title V of the Revenue Act of 1936 amended Section 602½ of the Revenue Act of 1934.

3. Said taxes were paid under protest in the amounts and at the times hereinafter set forth to the several Collectors of Internal Revenue for the Fifth District of New Jersey, successively in office at the times of said payments, none of whom was in office at the time this suit or proceeding was commenced.

4. This Court has jurisdiction of this suit pursuant to paragraph 20 of Section 24 of the Judicial Code as amended. (28 U. S. C. A. 41 (20).)

5. As shown on the attached Schedule A which is hereby made a part hereof, between June 1, 1935 and February 28, 1937 plaintiff, pursuant to the requirements of Regulations 48 issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, paid, under [fol. 28] protest, taxes aggregating $885,874.56 with respect to the usage, month by month, during the period May 1, 1935 to January 31, 1937, of various processed forms of Coconut Oil, Palm Oil and Palm Kernel Oil, which said oils had, prior to the effective date of Section 602½ of the Revenue Act of 1934, been subjected in the United States to one of the domestic processes hereinafter described in the manufacture or production of an article or articles intended for sale. Said Schedule A shows the aggregate pounds of said oils according to the processed form in which said oils were on the effective date of said Section 602½ of the Revenue Act of 1934, and shows the respective monthly usages on and after May 1, 1935, of such processed forms of said oils, together with the total amount of the tax paid under protest with respect to each month's usage thereof, and the respective dates of payment opposite the respective amounts.

6. The aggregate of 12,466,411 pounds of refined oil and foots (refined Coconut Oil and foots) shown on Schedule A under the column headed "Refined and Foots" had been produced, prior to the effective date of said Section 602½ of the Revenue Act of 1934, by subjecting crude Coconut Oil in the United States to the well-known commercial process of refining which is in common use and is generally re-

ferred to as the "Caustic Soda Process," described as follows:

The operation consists of adding to a known quantity of crude coconut oil a solution of caustic soda or solutions of caustic soda and salt, the amount and concentration of which are computed from a laboratory determination of the free fatty acid content of the crude oil. The crude oil is heated to a predetermined temperature and while the heated oil is being agitated mechanically or by means of [fol. 29] compressed air, the caustic solution is added. The agitation is continued until the operator, by examining samples, observes that the "foots" show a clean break and settle rapidly, whereupon the agitation is stopped and the contents are allowed to settle. After settling and as a result of this process, two products are obtained, viz.: a supernatant layer of clear oil which is commonly known and referred to as "refined Coconut Oil" and the lower layer consisting of what is generally known as "foots." The operator by observing the samples during the refining process, can tell when the mixture is in condition to separate properly and yield the maximum of refined oil. However, samples were sent to the laboratory for testing as to color and free fatty acid content of the refined Coconut Oil. The refined oil produced in such refining process is a different product from the crude oil, the refined oil being much lighter in color than the crude oil and being substantially free from free fatty acid.

The lower layer resulting from the above process, commonly referred to and known as "foots," is a different product from the crude oil originally put into the process; the foots are darker in color than either the original crude oil or the refined oil and consist of a semi-solid mass of soap, water, some refined oil in emulsion and coloring and other organic matter removed from the crude oil in the refining process. On the effective date of Section 602½ of the Revenue Act of 1934 the super-natant layer of clear, refined oil had not been transferred to the storage tanks but remained with the "foots" in the tanks in which the refining process had been conducted, although there was then a clear separation between the refined oil and foots.

7. On and after May 1, 1935, the said 12,466,411 pounds of refined oil and foots shown under the column headed [fol. 30] "Refined and Foots" in Exhibit A hereof were

further processed or used in the United States in the respective quantities and during the respective months as indicated on said Schedule A, and the plaintiff paid the tax under protest at the rate of three cents per pound with respect to such subsequent processing or usage, on the dates as indicated on said Schedule A.

8. The 63,977 pounds of foots (Palm Kernel Oil foots) shown on Schedule A under the column headed "Foots" represent the product obtained in the lower layer from subjecting crude Palm Kernel Oil to the refining process described in Paragraph 6 hereof, which processing was carried on in the United States prior to May 10, 1934.

9. Said 63,997 pounds of foots were subsequently processed or used in the United States after May 1, 1935, viz., during the month of July, 1935, and the tax at the rate of three cents per pound with respect to such subsequent processing or usage was paid under protest by the plaintiff on August 23, 1935, all as indicated on said Schedule A.

10. The 16,998,764 pounds of bleached Palm Oil shown on Schedule A under the column headed "Bleached" had been obtained, prior to May 10, 1934, by subjecting crude Palm Oil in the United States to the well-known commercial process of bleaching known as the "Air Bleaching Process." This process consists in the oxidation of certain coloring matters in the crude oil as the result of which a product different from the crude oil is obtained, which is lighter in color than the crude oil and is generally known and referred to as "bleached palm oil." The "Air Bleaching Process" consists of heating the crude oil to a pre-determined temperature after which air is aspirated or blown through the [fol. 31] heated oil until a sample shows the desired degree of bleaching. When the operator judges the bleaching process complete a sample is tested by the laboratory to ascertain if the bleached oil conforms to the required specifications.

11. The said 16,998,764 pounds of bleached palm oil shown under the column headed "Bleached" on Schedule A hereof were, on and after May 1, 1935, further processed or used by the plaintiff in the United States in the respective months shown on said Schedule and the plaintiff paid a tax, under protest, at the rate of three cents per pound

with respect to such subsequent processing or use on the respective dates shown on said Schedule A.

12. Of the total bleached Palm Oil which plaintiff had on hand on May 10, 1934, obtained by subjecting crude Palm Oil in the United States, prior to said date, to the "Air Bleaching Process" hereinabove described, said 16,998,764 pounds were so processed or used between May 1, 1935 and January 31, 1937, as aforesaid, and 1,568,741 pounds thereof were sold by plaintiff to other persons or corporations from time to time during said period May 1, 1935 to January 31, 1937 inclusive.

13. The processed forms of oils hereinbefore referred to and upon the subsequent processing of which were levied the taxes herein sought to be recovered, continued to be oils in their respective processed forms as hereinabove stated, up to and at the time when they were used as aforesaid after the effective date of Section 602½, said subsequent usage being in each case a use in the manufacture or production of an article or articles intended for sale.

14. Generally, though not always, after each processing of any of said oils, the resulting products were drawn from [fol. 32] the processing tanks by plaintiff and were pumped to storage tanks where the respective processed forms of that particular oil were stored for subsequent usage or sale. When the resulting products had not been transferred to their respective storage tanks on or prior to the effective date of said Section 602½ of the Revenue Act of 1934 and were not stored separately, plaintiff's records and Schedule A hereof show the quantities of the respective products combined as one item: for example, where the refined oil and foots both remained in the same tank on the effective date of said Section 602½ of the Revenue Act of 1934, although there was then a clear separation of the two, plaintiff deemed it expedient, from an accounting standpoint, to combine both items in one account as "Refined Oil and Foots" to which reference has heretofore been made in Paragraph 6 hereof.

15. Of the sum of $885,874.56 paid on account of said taxes alleged to have been erroneously and illegally assessed, the sum of $810,420.15 was paid with respect to usage of the aforesaid oils between May 1, 1935 and August 20, 1936, inclusive, and the sum of $75,454.41 was paid with re-

spect to the usage of the aforesaid oils on or after August 21, 1936.

16. Plaintiff filed with the said Collectors of Internal Revenue for the Fifth District of New Jersey, respectively, a protest ~~each month against~~ the payment of any tax on said subsequent processing of said processed oils, specifying in detail the amounts of such oils so subsequently used during the respective months from May 1, 1935 to January 31, 1937.

17. On June 16, 1939 plaintiff duly filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey, a claim for refund of the taxes paid [fol. 33] as aforesaid, plus interest thereon, a true copy of an excerpt therefrom setting forth the basis of said claim being hereto attached and made a part hereof as Schedule B. Said claim for refund was rejected in full by the Commissioner of Internal Revenue on July 14, 1939 and this suit was thereafter timely instituted.

18. If plaintiff is entitled to recover for said taxes assessed and collected during the aforesaid period under Section 602½ of Title IV of the Revenue Act of 1934 and under Section 702 of Title V of the Revenue Act of 1936, it is entitled to recover from the defendant the sum of $885,874.56, plus interest at the rate of six per cent per annum until payment, on the following sums:

On $83,544.75 from June 26, 1935.
On $84,732.87 from July 31, 1935.
On $64,430.10 from August 23, 1935.
On $50,720.91 from September 27, 1935.
On $43,719.03 from October 31, 1935.
On $57,806.13 from November 29, 1935.
On $39,606.06 from December 28, 1935.
On $65,982.18 from January 27, 1936.
On $63,401.49 from February 28, 1936.
On $60,087.15 from March 31, 1936.
On $52,135.29 from April 30, 1936.
On $37,617.30 from May 27, 1936.
On $36,971.67 from June 25, 1936.
On $37,356.87 from July 25, 1936.
On $18,019.14 from August 19, 1936.
On $19,600.32 from September 28, 1936.
On $29,186.79 from October 27, 1936.

On $22,297.32 from November 28, 1936.
On $9,880.74 from December 23, 1936.
On $8,218.38 from January 28, 1937.
On $560.07 from February 27, 1937.

[fol. 34] 19. In administering Section 602½ of the Revenue Act of 1934, the Commissioner of Internal Revenue has always construed said Section to mean that the liability for the tax accrues during the month when the first processing after May 10, 1934 in the United States of the specified oils occurred, in the manufacture of an article intended for sale, irrespective of whether such manufacture was completed during the month of such first processing or whether further processings in such manufacture were necessary and occurred during subsequent months.

20. It is understood and agreed that the facts hereinabove stipulated constitute the entire proof to be offered in this case, provided, however, that in stipulating said facts neither party admits the competency, relevancy or materiality of any of such facts, but each party reserves the right to object to the competency, relevancy or materiality of any stipulated fact, and if any such objection is sustained by the Court the other party shall be at liberty, for purposes of the record, to offer oral testimony or other proof in lieu of the stipulated fact or facts so stricken by the Court.

E. Ennalls Berl, Attorney for Plaintiff. Stewart Lynch, Attorney for Defendant.

Dated: June 27, 1940.

[fol. 35] SCHEDULE "A" TO STIPULATION OF FACTS

Colgate-Palmolive-Peet Company

Table Showing Month by Month Usage in Pounds Between May 1, 1935 and Jan. 31, 1937, of Processed Forms of Vegetable Oils (Coconut, Palm and Palm Kernel) Which Oils Had Been Domestically Processed Prior to the Effective Date of Section 602½ of the Revenue Act of 1934; the Tax Paid Under Protest by Plaintiff with Respect to Such Subsequent Usage, and the Respective Dates of Payment Thereof. The Quantities in Pounds of the Various Oils Are Combined and Grouped According to the Processed Form Thereof.

Period		Foots	Refined & Foots	Bleached	Total Used	Tax Paid	Date of Payment
1935	May	none	940,329	1,844,496	2,784,825	$83,544.75	6-26-35
	June	none	673,218	2,151,211	2,824,429	84,732.87	7-31-35
	July	63,977	487,530	1,596,163	2,147,670	64,430.10	8-23-35
	Aug.		517,096	1,172,601	1,690,697	50,720.91	9-27-35
	Sept.		760,248	697,053	1,457,301	43,719.03	10-31-35
	Oct.		942,940	983,931	1,926,871	57,806.13	11-29-35
	Nov.		1,061,613	258,589	1,320,202	39,606.06	12-28-35
	Dec.		710,446	1,488,960	2,199,406	65,982.18	1-27-36
1936	Jan.		1,098,936	1,014,447	2,113,383	63,401.49	2-28-36
	Feb.		1,139,955	862,950	2,002,905	60,087.15	3-31-36
	Mar.		1,201,282	536,561	1,737,843	52,135.29	4-30-36
	Apr.		957,997	295,913	1,253,910	36,617.30	5-27-36
	May		458,329	774,060	1,232,389	36,971.67	6-25-36
	June		643,183	602,046	1,245,229	37,356.87	7-25-36
	July		287,329	333,309	600,638	18,019.14	8-19-36
	Aug.		265,904	387,440	653,344	19,600.32	9-28-36
	Sept.		275,161	697,732	972,893	29,186.79	10-27-36
	Oct.		64,915	678,329	743,244	22,297.32	11-28-36
	Nov.			329,358	329,358	9,880.74	12-23-36
	Dec.			273,946	273,946	8,218.38	1-28-37
1937	Jan.			18,669	18,669	560.07	2-27-37
		63,977	11,466,411	16,998,764	29,529,152	$885,874.56	

[fol. 36] SCHEDULE B TO STIPULATION OF FACTS

Rider A

Rider Attached to and Made a Part of Claim of Colgate-Palmolive-Peet Company for Refund of Certain Oil Processing Taxes Under Section 602½ of the Revenue Act of 1934 and Under the Amendments of Said Section 602½ Paid by Said Company for the Period May 1, 1935 Through January 31, 1937 Inclusive.

Taxpayer is entitled to the allowance of its claim for refund in the amounts hereinafter stated and for the reasons hereinafter set out.

Regulations 48 issued by the Commissioner of Internal Revenue construe the term "first domestic processing" as used in Section 602½ of the Revenue Act of 1934 and in the amendments of said Section 602½, to mean, with respect to

any of the specified oils not previously taxed, any use in the United States in the manufacture of an article intended for sale which happens to be the *"first use" on and after the effective date of the tax* notwithstanding that the said Section, as enacted and as amended, in explicit language defines said term to mean the *"first use in the United States* in the manufacture or production of an article intended for sale," etc. Such attempt to broaden the scope of said Section by said Regulations is wholly unwarranted, illegal and void. No executive tribunal or officer can constitutionally make any rule or regulation the effect of which is to add to, take from, or otherwise change a statute. Such construction in the aforesaid Regulations 48 is simply an attempt by an Executive Officer or Department to write into the statute something which is not there.

[fol. 37] On the effective date of said Section 602½, viz., May 10, 1934 at 11:40 A. M., Eastern Standard Time, Taxpayer had on hand certain palm oil, coconut oil, palm kernel oil and sunflower seed oil which had prior to said date, been bleached and/or refined in the United States in the manufacture or production of an article intended for sale. Such bleaching and/or refining in the United States prior to said date constituted the "first domestic processing" of such oils within the contemplation of said Section 602½ and any subsequent processing or use of said oils was not subject to the tax imposed by said section. Notwithstanding that such oils had in every instance been first domestically processed and "first used" by Taxpayer in the United States prior to said effective date in the manufacture of products intended for sale, Taxpayer to comply with the apparent purport of Regulations 48 and with rulings of the Bureau of Internal Revenue, reported the subsequent processing or use by it during the period May 1, 1935 through January 31, 1937 inclusive, of such oils so previously processed, and the tax was assessed against and collected from the Taxpayer with respect to such subsequent processing or use. Attached hereto, marked "Exhibit 1" and made a part hereof, is a schedule showing by months the quantities of the respective processed oils so subsequently processed or used by Taxpayer, the total quantities of such processed oils so used by Taxpayer during each month, and the total tax assessed and collected from the Taxpayer with respect to such use. Taxpayer has hereto-

fore filed with the Collector of Internal Revenue, Fifth District of New Jersey a protest each month against the payment of said tax on such processed oils, specifying in detail substantially all of such oils so subsequently used and the [fol. 38] tax paid thereon for each of the months during the period covered by this claim, viz., May 1, 1935 to and including January 31, 1937, to which protests reference is hereby made. The taxes so assessed and collected from Taxpayer with respect to such oils so bleached and/or refined prior to May 10, 1934, have been illegally and erroneously assessed and collected and Taxpayer is entitled to a refund thereof with interest.

Attached hereto, marked "Exhibit 2" and made a part hereof, is a schedule showing by months the total oil processing taxes paid with respect to said period by the Taxpayer to said Collector of Internal Revenue under said Section 602½, with the respective dates of payment thereof, together with the amounts of such payments which were erroneously and illegally assessed and collected with respect to the subsequent processing or use of said oils so processed prior to said effective date, aggregating a total of $885,874.56. Taxpayer is entitled to a refund of said sum of $885,874.56, with interest, from the respective dates of payment.

[fol. 39] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791, 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA

And afterwards, to wit, the 23d day of October, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 31st day of March, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 40] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791-7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA, Defendant

On Appeals from the District Court of the United States for the District of Delaware

OPINION—Filed March 31, 1942

Before Biggs, Maris and Goodrich, Circuit Judges

BIGGS, Circuit Judge:

The question presented for our determination by the appeals at bar is the construction of Section 602½, c. 277 of the Revenue Act of 1934, 48 Stat. 680, 26 U. S. C. A. Internal Revenue Acts p. 778.

The appellant makes soaps and other products and uses coconut oil, palm oil and other oils in their manufacture. [fol. 41] On May 10, 1934, the effective date of Section 602½, it had on hand over 78,000,000 pounds of coconut and other oils referred to in the statute which had received one or more domestic processings. After the effective date of the statute these oils were subjected to further processings by the appellant in the manufacture of products intended for sale. The appellant paid the taxes and made claims for refunds which were rejected by the Commissioner. The appellant then sued the United States.

The court below held that the phrases of the statute, "first domestic processing" and "first use", mean the first domestic processing or first use in the United States after the effective date of the act. See Colgate-Palmolive-Peet Company v. United States, 37 F. Supp. 794. The pertinent portions of Section 602½ are set out in the margin.[1] There

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[1] Section 602½ provides:

"Processing Tax on Certain Oils.

'(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound to be paid by the processor, upon the first domestic processing of coconut oil or of any combination or mixture containing a substantial quantity of coconut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials the growth or production of the Philippine Islands or any other possession of the United States, or (C) was brought into the United States on or be-

[fol. 42] is no dispute between the parties as to the meaning of the phrases "domestic processing" or "use in the United States". All concede that the oils subjected to the tax, were processed in the United States both before and after the effective date of the act. The dispute arises as to the meaning of the phrase "the first" as used throughout the statute.

The appellant makes a number of contentions. It refers to the word "first" as defined in Funk & Wagnall's New Standard Dictionary, 1938, as meaning "Prior to all others in time or occurrence; earliest, as the first snow of the season." To this may be added the definition contained in Webster's New International Dictionary, Second Edition, viz., "Preceding all others; foremost;—used as an ordinal of *one;* as (a) earliest in time or succession;—said of either

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fore the 30th day after the date of the enactment of this Act or produced from materials brought into the United States on or before the 30th day after the date of enactment of this Act, or (D) was purchased under a bona fide co-tract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

Subdivision (1) of Article 1 of Regulations 48 provides:

"(1) First domestic processing means the first use in the United States on or after the effective date of the Act. At all times in these regulations, the term processing or first domestic processing will be deemed to be synonymous with 'use' or 'first use in the United States on or after the effective date', respectively, and will include the meanings implied in the latter terms by subdivision (k) above."

the past or future, as he was the *first* to come; the *first* train leaves at noon; my *first* voyage; the *first* year of Independence; (b) foremost in position;—in front of or in advance of all others; as *first* in the race; . . ." The appellant urges that if the modifying adjective "first" be given its ordinary or normal meaning it must refer to the earliest use of processing in the United States, that which precedes all others in point of time. This interpretation, says the appellant, is the same as that which the Treasury Department put upon the phrase, "'the first domestic processing" used in Section 9(a) of the Agricultural Adjustment Act, ap-[fol. 43] proved May 12, 1933, c. 25, 48 Stat. 31, 7 U. S. C. A. § 609(a). The appellant contends that Section 602½ of the Revenue Act of 1934 was derived from Section 9(a) of the Agricultural Adjustment Act.

We entertain little doubt that the provisions of Section 602½ were derived largely from Section 9(a). The Treasury Regulations (Article 7 of Treasury Regulations 81, approved July 12, 1933) and the amendments thereto promulgated by the Treasury Department in connection with Section 9(a) of the Agricultural Adjustment Act bear out the appellant's assertion that the Treasury Department construed the phrase "the first domestic processing" to mean the first in point of time.[2] If the provisions of Sec-

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[2] Article 7 of Regulations 81, approved July 12, 1933, promulgated under the Agricultural Adjustment Act, provides:

"When tax attaches.—The tax attaches upon the first domestic processing of the commodity. Where some part of the first domestic processing of a particular quantity of the commodity takes place during the period when the tax is effective, the tax attaches notwithstanding that some portion of the first domestic processing of such quantity takes place before or after such period."

The foregoing was amended on September 20, 1933 by T. D. 4392, Article 7 (See C. B. XII-2, p. 430) to read as follows:

"When tax attaches.—The tax attaches at the beginning of the first domestic processing of the commodity. When the first domestic processing begins before the effective date, no tax attaches, although it is not completed until after the effective date. When the first domestic processing begins while the tax is in effect, it is subject to the proc-

tions 9(a) and 602½ are deemed to be in *pari materia* the [fol. 44] two sections should be interpreted similarly. While the Agricultural Adjustment Act placed a floor tax upon commodities already processed (See Supplementary Revenue Provisions of the Agricultural Adjustment Act, Section 16(a), c. 25, 48 Stat. 40 and the last regulation cited in note 2 supra), Congress did not impose any floor tax under the Revenue Act of 1934. Because of this Section 9(a) and Section 602½ cannot be deemed to be in *pari materia* even if the commodities named in Section 9(a) be deemed to be the equivalent for tax purposes of the oils referred to in Section 602½.

The appellant contends that the history of the section shows that it was the purpose of Congress to protect domestic farm products against competitive oils brought into this country by levying a compensating tax on the first actual use of such oils within the United States. The appellant takes the position that Congress did not intend to tax any processing after the first processing in point of time in the United States because such a tax would not effectuate the purpose of Section 602½ which is a substitute for an impost. The appellant points out that when the Revenue Act of 1928, 45 Stat. 791, was under consideration unsuccessful attempts were made by members of Congress from agricultural and cattle-raising states to impose duties

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essing tax, notwithstanding it is not completed until after the tax is terminated."

Article 7 was again amended on November 2, 1933, by T. D. 4403 (See C. B. XII-2, p. 430) to be effective retroactively to July 9, 1933. Article 7 in its final form provides:

"When tax attaches.—The tax is imposed upon the first domestic processing, and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of the commodity (1) if it is in process on the effective date, provided the first domestic processing has not been completed prior to that date, or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82)."

upon imported competitive oils including coconut oil. These proposed amendments were rejected.[3] In 1929 when the Tariff Act of 1930, 46 Stat. 590, 19 U. S. C. A. § 1001, was again before Congress, amendments were offered to place imports upon competing foreign oils.[4] These proposals were not made law. When Congress had before it the Revenue Act of 1932, 47 Stat. 169, similar amendments were proposed but were rejected again.[5] During the Seventy-Second Congress a separate bill, H. R. 12,835, was introduced to provide an amendment to the Tariff Act of 1930 in order to impose a duty on such oils as were processed in the case at bar. This bill did not pass.

[fol. 45] The continuous agitation for the protection of domestic farm products from duty-free coconut oil and other competitive vegetable oils resulted in the passage of the statute under consideration. See the statements of Congressman Schallenberger,[6] those of Congressman Knutson,[7] those of Senator Byrnes,[8] those of Senator Borah[9] and those of Senator Norris.[10] The fact that the Philippine Independence Act of March 24, 1934, c. 84, Section 6(b), 48 Stat. 456, 459, 48 U. S. C. A. 1236(b), specifically authorized the importation free of duty of 200,000 long tons of Philippine coconut oil a year for ten years made it impossible for Congress to place an impost on Philippine coconut oil without a breach of faith. Congress, in order to protect the American farmer, but also to keep faith with the people of the Philippines, substituted for an impost upon Philippine oil the tax provided by Section 602½. It follows, says the appellant, that Congress intended the tax of 602½ to attach to the earliest use of the oils after entry into the United States and therefore Congress intended to levy the tax upon "the first domestic processing" in point of time.

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[3] See Cong. Record, Vol. 69, pp. 8483, 9202.

[4] See Cong. Record, Vol. 71, p. 4914, et seq.; Vol. 72, pp. 5717, 5942.

[5] See Cong. Record, Vol. 75, pp. 10,249 et seq., 11,095-11,116.

[6] See Cong. Record, Vol. 78, p. 2529.

[7] See Cong. Record, Vol. 78, pp. 2614, 2615.

[8] See Cong. Record, Vol. 78, p. 6314.

[9] See Cong. Record, Vol. 78, p. 6316.

[10] See Cong. Record, Vol. 78, p. 6380.

Our difficulty in accepting these arguments lies in the fact that we can see no reason why Congress should not have desired to protect domestic fats against competitive imported oils whether prior to the passage of the act these had been processed within the United States or not. Obviously Congress could have made its intention very plain by adding a very few words to the phrase "first domestic processing" such as "in point of time", if that body had in mind the end which the appellant contends it had. Upon the other hand if we take the literal meaning of the word "first", we must concede that it means in advance of all others, the earliest.

[fol. 46] Two plain sign posts remain to guide us. First, as was stated by the learned trial judge a statute is presumed to operate on future acts unless the contrary intent is declared. See Hassett v. Welch, 303 U. S. 303, 314. A similar view was expressed by the Circuit Court of Appeals for the Second Circuit in Loose-Wiles Biscuit Co. v. Rasquin, 95 F. (2nd) 438, 440, cert. den. 305 U. S. 611. The Court of Claims in the case of Tasty Baking Co. v. United States, 38 F. Supp. 844, reached a similar conclusion, though upon somewhat different reasoning. In our opinion the doctrine of the prospective operation of a statute has become so much a part of our law as to require Congress to employ plain words to overcome the presumption that a statute will so operate.

Second, Treasury Regulations 48 (see note 1, supra) construe the phrase "first domestic processing" as meaning the first use in the United States after the effective date of the Act. The defendant points out that these regulations were promulgated by the Treasury Department pursuant to the provisions of Section 1101 of the Revenue Act of 1926. See 44 Stat. 111. Sec. 602½(f) of the Revenue Act of 1934, 48 Stat., 764, provides that all provisions of Section 600 of the Revenue Act of 1926, 44 Stat. 93, not inconsistent with the provisions of Sec. 602½ of the Revenue Act of 1934 shall be applicable in respect to the taxes imposed by Section 602½. In effect, therefore, contends the defendant, Treasury Regulations 48 were made applicable to Section 602½ of the Revenue Act of 1934. Since the promulgation of the regulations referred to Congress on one occasion amended Section 602½ without any indication of disapproval of the interpretation of the Treasury Department as to the prospective operation of the statute.

By Section 402 of the Revenue Act of 1935, 49 Stat. 1026, Congress imposed a compensatory tax upon the importation of articles produced from the oils named in Section 602½.

The United States claims similar approval by Congress by the enactment of Section 702 of the Revenue Act of 1936, 49 Stat. 1742, amending Section 602½ (a). This con- [fol. 47] tention cannot be sustained, however, because Congress made substantial changes in the wording of Section 602½ though it did refer specifically to the existing regulations in respect to definitions of combinations or mixtures.[11] This may indicate some degree of approval by Congress of the interpretation by the regulations of the prospective action of Section 602½ (a) as enacted in the Revenue Act of 1934, but since the statute was not reenacted in identical language the rule of congressional confirmation enunciated by Brewster v. Gage, 280 U. S. 327, 337, and Mass. Mufual Life Ins. Co. v. United States, 288 U. S. 269, 273, cannot be applied.

We have given careful consideration to the appellant's argument in respect to the 1936 amendment. Put briefly it is as follows. As we have already indicated Section 702(a) of the 1936 Revenue Act amended Section 602½ of the Revenue Act of 1934. As the amendment was originally proposed by the Senate Finance Committee and passed by the Senate,[12] it stated in part, "There is hereby imposed upon the first domestic processing of coconut oil, palm oil . . .; fatty acids . . . (whether or not . . . refined . . . or otherwise processed), or any combination or mixture [thereof] . . ., with respect to any of which . . . there has been no previous first domestic processing and no import tax has been paid . . . a tax of 3 cents per pound to be paid by the processor." These words were apparently insufficient to express the intent of Congress for the bill was rewritten in committee and the words "taxed under this section" was added to the phrase "no previous domestic processing". The addition of this phrase, says the appellant, resulted in two classifications of "previous first domestic processings", viz., a class of those previous processings which had been taxed under the section and which, accord-

[11] See S. Rep. No. 2156, 74th Cong., 2nd Sess. p. 30 (1939-1 Cum. Bull. (Part 678, 698)).

[12] See Cong. Rec. Vol. 80, p. 8786.

ingly, must have occurred *subsequent* to the effective date of the Revenue Act of 1934, and a second class of previous first domestic processings not taxed under the section [fol. 48] which could have occurred only *prior* to the effective date of the Revenue Act of 1934.

Study of the 1936 amendment leads, we think, to the opposite conclusion. Congress intended to tax oils of the designated classes or combinations which had not been previously taxed under Section 602½ (a) or upon which an import tax had not been paid under Section 601(c) (8) of the Revenue Act of 1932. In short we think that the amendment shows it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not. It follows that Congress intended oils or combinations processed subsequent to the effective date of the 1934 Revenue Act to be taxed.

The question posed for our determination is a difficult one. Following the two sign posts to which we have referred we conclude that the District Court reached the right result.

Accordingly, the judgments are affirmed.

A true copy:
Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 49] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1941

No. 7791

Colgate-Palmolive-Peet Company, Appellant,

vs.

United States of America, Appellee

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

March 31, 1942.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Affirming Judgment. Received and Filed March 31, 1942. Wm. P. Rowland, Clerk.

[fol. 50] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7792

COLGATE-PALMOLIVE-PEET COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

March 31, 1942.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Affirming Judgment. Received and Filed March 31, 1942. Wm. P. Rowland, Clerk.

[fol. 51] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA, Defendant-Appellee

ORDER EXTENDING TIME FOR PETITION FOR REHEARING

Before Biggs, and Goodrich, Circuit Judges

It is hereby Ordered that the time for filing petition for rehearing in the above entitled cases be and the same is hereby extended for an additional fifteen days.

April 6, 1942.

For the Court, John Biggs, Jr., Circuit Judge.

Endorsements: Order extending time for filing Petition for Rehearing. Received and Filed April 6, 1942. Wm. P. Rowland, Clerk.

[fol. 52] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA, Defendant

PETITION FOR REHEARING

The appellant respectfully petitions for a rehearing on the following grounds:

1. The Court overlooked that the specific aim of Congress, as expressed in the debates, was the limitation of future imports and not taxation of oils on hand; there was no occasion to resort to a novel and, we submit, an erroneous application of the principle of the prospective operation of statutes.

2. The Court has distorted the principle of prospective operation of statutes, and has applied it to the exclusion of other established canons of construction.

3. When the intent of Congress is made plain by the debates, to resort to a dubious use of an abstract canon of construction becomes completely unrealistic.

[fol. 53] 4. The view (Opinion, p. 7) that Treasury Regulations 48 were in effect adopted and ratified by the Revenue Act of 1934 and made applicable to Section 602½ thereof is based on the erroneous premise that those Regulations were promulgated prior to the enactment of that Act whereas the fact is that they were issued after its enactment.

5. The Court erred in holding that Section 402 of the Revenue Act of 1935 constituted an amendment of Section 602½ of the Revenue Act of 1934 and accordingly erred in holding that it constituted legislative approval of the Treasury Department's interpretation of Section 602½.

6. The Court misapprehended the facts relating to the 1936 Amendment of Section 602½ and consequently failed to give effect to distinctions made therein by Congress.

7. The omission from Section 602½ of the supplementary floor stock tax found in the Agricultural Adjustment Act does not indicate that the phrase "the first domestic processing" is to be taken in a different sense in Section 602½ from that in which it was employed in the A. A. A.

[fol. 54] Conclusion

It is, therefore, respectfully urged that this petition for a rehearing should be granted.

Respectfully submitted, E. Ennalls Berl, Attorney for Appellant-Petitioner, Delaware Trust Building, Wilmington, Delaware.

Albert C. Wall, Mason Trowbridge, Blevins C. Dunklin, Edward J. O'Mara, Of Counsel.

Certificate of Counsel

E. Ennalls Berl, attorney for the above named petitioner-appellant, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

E. Ennalls Berl, Attorney for Petitioner-Appellant.

[fol. 55] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7791

COLGATE-PALMOLIVE-PEET CO., Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

SUR PETITION FOR REHEARING

And Now, to wit, June 3, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted, and the case set for rehearing on Monday, June 15, 1942.

Philadelphia.

John Biggs, Jr., Circuit Judge.

Endorsements: Order granting petition for rehearing. Received & Filed June 3, 1942. Wm. P. Rowland, Clerk.

[fol. 56] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7792

COLGATE-PALMOLIVE-PEET CO., Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

SUR PETITION FOR REHEARING

And Now, to wit June 3, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted, and the case set for rehearing on Monday, June 15, 1942.

Philadelphia.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Granting Rehearing Received and filed June 3, 1942. Wm. P. Rowland, Clerk.

[fol. 57] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791, 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA

And afterwards, to wit, the 15th day of June, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 21st day of August, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 58] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791-7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant

On Appeals from the District Court of the United States for the District of Delaware

OPINION ON REHEARING—Filed August 21, 1942

Before Biggs, Maris and Goodrich, Circuit Judges

BIGGS, Circuit Judge:

After careful reconsideration of this case on reargument a majority of the court feel constrained to reach the same decision as that expressed in our first opinion. The opin-

ion, however, contains two errors which should be corrected.

We stated in our opinion, "Since the promulgation of the regulations referred to [Treasury Regulations 48] Congress on one occasion amended Section 602½ without any [fol. 59] indication of disapproval of the interpretation of the Treasury Department as to the prospective operation of the statute.", and we went on to say that Congress by Section 402 of the Revenue Act of 1935, 49 Stat. 1026, imposed a compensatory tax upon the importation of articles produced from the oils named in Section 602½. Obviously, the word "amended" was used erroneously. Congress did not amend Section 602½, but it dealt with a subject matter closely allied to that contained in Section 602½ and in doing so indicated no disapproval of the interpretation put upon that section by the Treasury Department in Regulations 48. We think that these facts furnish some evidence that Congress was not dissatisfied with the Treasury Department's interpretation providing prospective operation for Section 602½.

We stated also that the appellee claimed approval by Congress of Regulations 48 by reason of the enactment of Section 702 of the Revenue Act of 1936, 49 Stat. 1742 amending Section 602½. We concluded that the appellee's contention could not be sustained "* * * because Congress made substantial changes in the wording of Section 602½, though it did refer specifically to the existing regulations in respect to definitions of combinations or mixtures." We think we adopted too narrow a view of the doctrine of implicit approval by Congress of departmental interpretations of statutes by reenactment of their provisions by subsequent legislation. In Loose-Wiles Biscuit Co. v. Rasquin, 95 F. (2nd) 438, Judge Chase ruled correctly upon this subject and upon this very statute. He considered that Congress had tacitly approved the Treasury interpretation of Section 602½ by Regulations 48 because it enacted Section 702 of the Revenue Act of 1936. See also Helvering v. Wilshire Oil Co., 308 U. S. 90, 100. Compare Textile Mills Corp. v. Commissioner, 304 U. S. 326, 335-339. It is sufficient if an amendment dealing with substantially the same subject matter as the amended statute makes no change indicating disapproval by Congress of existing departmental interpretation.

[fol. 60] After consideration of every point raised by the appellant we can perceive no reason why our prior decision should be altered. Accordingly the judgments will be affirmed.

MARIS, Circuit Judge, dissenting:

After full consideration of the arguments advanced upon the rehearing of this case I find myself constrained to dissent from the judgment of the court. In my view the construction placed by the majority of the court upon Section 602½ of the Revenue Act of 1934 cannot be supported either by its language or by the intent of its framers as shown by its legislative history. I shall briefly set forth the reasons for my view.

In the first place the phrase "first domestic processing" seems to me to be wholly free from ambiguity. "First", when used as here in respect of time, means earliest in point of time. If no reference point in time is specified the reference must be to the beginning of time. The majority say that another reference point, the effective date of the act, was intended. But it is not so expressed in the act and I find no convincing evidence that Congress so intended.

The provisions of Section 602½ were derived largely from Section 9(a) of the Agricultural Adjustment Act of May 12, 1933 and the phrase "first domestic processing" was taken verbatim therefrom. It is conceded that in the Agricultural Adjustment Act the word "first" was used in the absolute sense of earliest in time. I find nothing to indicate that Congress did not intend to use the word in the same sense when it included the phrase in Section 602½. Furthermore when Congress in the Revenue Act of 1936 amended Section 602½ it indicated by the use of the phrase "first domestic processing taxed under this section" that it recognized that not all first domestic processings were taxable.

Secondly the legislative history of Section 602½ convinces me, as it convinced Judge Sullivan in Durkee Famous [fol. 61] Foods v. Harrison, — F. Supp. — (D. C. Ill. 1942), that it was the purpose of Congress to protect domestic farm products against competition from specified oils which were brought from outside the United States, by levying a tax on their first use within the United States. As Judge Sulli-

van pointed out in the case just cited: "The Philippine Independence Act had been passed on March 24th, 1934, (48 U. S. C. A. 1236 (b)) specifically authorizing the importation, free of duty, of a designated amount of coconut oil each year for a period of ten years, thus precluding Congress from placing an import duty thereon. Therefore, the amendments to subdivision (a) of Section 602½, as adopted, provided for (1) a surtax of two cents per pound on coconut oil of non-Philippine origin; and (2) provided for the segregation and payment into the Philippine treasury of the entire tax collected on Philippine coconut oil. Tracing the progress of the oil processing tax statute from its inception as Section 602 of the Revenue Act of 1934, to its final enactment as Section 602½ thereof, the Congressional debates and reports all evidence the same legislative purpose of protecting the American farmers' products against oils brought in from outside the United States. The debates show that it was the intention of Congress, in enacting Section 602½, to extend to foreign oils the same type of processing tax as had already been levied upon the American farmers' products by the Agricultural Adjustment Act, and to use such tax as a substitute for a protective tariff. • • • Congressional Record, Vol. 78, pages 2513-2529; 2614-2658; 6308-6324-6314-6315-6380."

The majority rely for their decision largely upon two guide posts but these do not seem to me to point to the conclusion which the majority reach. The first is the rule that a statute is presumed to operate prospectively unless the contrary intent is declared. I am quite willing to concede that this rule is applicable to Section 602½. Its application, however, should merely result in imposing the tax upon those processings within the statutory definition which actually took place after the effective date of the act, not in [fol. 62] modifying the definition so as to impose the tax upon transactions which upon the normal application of the rule would have been exempt.

The second guide post to which the majority refer is Treasury Regulation 48 interpreting Section 602½. The regulation defines "first domestic processing" as "the first use in the United States on or after the effective date of the act." But the act itself defined "first domestic processing" as "the first use in the United States, in the manufacture

or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate." It will be observed that in the statutory definition there is no suggestion of a reference to the effective date of the act. It seems to me that in importing such a reference the regulation goes beyond its rightful field of interpretation and into the realm of amendment. Consequently I think that the regulation is invalid and that its application violates the settled rule, to which, however, the courts too frequently pay only lip service, that ambiguities in a revenue statute must be construed strictly against the Government and that doubts therein must be resolved in favor of the taxpayer.

A true Copy. Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 63] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7791

COLGATE-PALMOLIVE-PEET COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

John Biggs, Jr., Circuit Judge.

August 21, 1942.

Endorsements: Order Affirming Judgment. Received & Filed Aug. 21, 1942. Wm. P. Rowland, Clerk.

[fol. 64] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7792

COLGATE-PALMOLIVE-PEET COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

John Biggs, Jr., Circuit Judge.

August 21, 1942.

Endorsements: Order Affirming Judgment. Received & Filed Aug. 21, 1942. Wm. P. Rowland, Clerk.

[fol. 65] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Coram: Biggs and Goodrich, Circuit Judges

Upon application of counsel for appellant it is hereby Ordered that the time for filing a petition for rehearing in the above entitled cause be and the same hereby is extended to and including October 5, 1942.

For the Court, John Biggs, Jr., Circuit Judge.

September 3, 1942.

Endorsements—Order Extending Appellant's Time for Filing Petition for Rehearing to October 5, 1942. Received & Filed Sept. 3, 1942. Wm. P. Rowland, Clerk.

[fol. 66] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant

PETITION FOR SECOND REHEARING

The appellant respectfully petitions (a) for a second rehearing *en banc* (in view of the fact that the rule of approval by statutory reenactment or amendment as announced by a majority of the Court in this case is at variance with the rule heretofore announced by this Court, as well as in view of the other grounds below) or (b) if that be not granted, for a second rehearing by the Court as heretofore constituted in this case. The right of the Court to sit *en banc* is well settled. (*Textile Mills Corp.* v. *Commissioner*, 117 F. (2d) 62; affirmed 314 U. S. 326, 86 L. Ed. 242.) This petition is made upon the following grounds:

1. The majority of the Court are mistaken as to the facts respecting the 1936 amendment.

2. Presumably under the influence of that mistake the majority have failed to give full meaning and effect to all [fol. 67] the words of that amendment, as under established rules of construction should be done. That amendment cannot possibly constitute legislative approval of the Commissioner's regulation interpreting "first" to mean "first after the effective date of the tax".

3. The conclusion of the Court with respect to legislative approval is not sustained by either of the cases cited in the majority opinion on rehearing.

4. The rule adopted in the majority opinion is contrary to the rule of approval by re-enactment as stated and applied by the Supreme Court.

5. The rule of approval by amendment announced in the majority opinion is contrary to the rule heretofore

announced in this Court and leaves the law on that point in this Circuit in doubt.

6. The majority of the Court erred in holding that the principle of prospective operation of statutes requires that "first" be construed as meaning "first after the effective date of the tax."

7. The majority of the Court erred in rejecting the factual indicia of the intent of Congress. The Court recognizes that Section 602½ was derived largely from the Agricultural Adjustment Act and that "the first domestic processing" was there construed to mean the first in point of time; but the majority of the Court holds that the same language in Section 602½, intended to supplement the Agricultural Adjustment Act, should not be similarly construed.

8. The majority of the Court erred in refusing to apply the principle of doubt.

Counsel appreciate the great consideration which the Court has already extended to appellant. We should not [fol. 68] under ordinary circumstances ask any further indulgence. But the circumstances are not ordinary. A tax question has been decided against the taxpayer on factual grounds which are erroneous and on applications of legal principles which are unprecedented.

Conclusion

It is, therefore, respectfully urged that this petition for a second rehearing should be granted.

Respectfully submitted, E. Ennalls Berl, Attorney for Petitioner-Appellant, Delaware Trust Building, Wilmington, Delaware.

Albert C. Wall, Mason Trowbridge, Blevins C. Dunklin, Edward J. O'Mara, of Counsel.

Certificate of Counsel

E. Ennalls Berl, attorney for the above named petitioner-appellant, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

E. Ennalls Berl, Attorney for Petitioner-Appellant.

[fol. 69] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791-7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant

ORDER

Coram Biggs and Goodrich, Circuit Judges

And now, to-wit, this 10th day of November, 1942, it is Ordered that the phrase "two errors" appearing in the first paragraph of the Opinion on Rehearing filed herein on August 21, 1942 be and the same hereby is stricken out and the phrase "an error" be and the same hereby is substituted in lieu thereof; and it is

Further Ordered that the last sentence of the second paragraph of the Opinion on Rehearing be and the same hereby [fol. 70] is stricken out; and it is

Further Ordered that the third paragraph of the Opinion on Rehearing be and the same hereby is stricken out; and it is

Further Ordered that the petition for a second rehearing be and the same hereby is denied.

For the Court (S.) John Biggs, Jr., U. S. Circuit Judge.

Endorsements—Order Amending Opinion of the Court on Rehearing. Order Denying Petition for Second Rehearing. Received & Filed November 11, 1942. Wm. P. Rowland, Clerk.

[fol. 71] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and pro-

ceedings in this court in the cases of Colgate-Palmolive-Peet Company, appellant, vs. United States of America, Nos. 7791 and 7792, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of November in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 62] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

Nos. —

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff and Petitioner,

v.

UNITED STATES OF AMERICA, Defendant

Order Extending Time Within Which to File Petition for Writ of Certiorari

On consideration of the motion of counsel for plaintiff-petitioner in the above entitled cause, and good cause therefor having been shown,

It Is Now Here Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from and after February 10, 1943.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

Dated this 3rd day of February, 1943.

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 38

[Title omitted]

ORDER ALLOWING CERTIORARI—June 14, 1943

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

It is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, and the case is transferred to the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 14, 1943.

Mr. Justice Roberts took no part in the consideration or decision of this application.

[fol. 64] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 39

[Title omitted]

ORDER ALLOWING CERTIORARI—June 14, 1943

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

It is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, and the case is transferred to the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 14, 1943.

Mr. Justice Roberts took no part in the consideration or decision of this application.

Endorsed on Cover: File Nos. 47,408, 47,409. U. S. Circuit Court of Appeals, Third Circuit. Term No. 38. Colgate-Palmolive-Peet Company, Petitioner, vs. The United States of America. Term No. 39. Colgate-Palmolive-Peet Company, Petitioner, vs. The United States of America. Petition for writs of certiorari and exhibit thereto. Filed April 10, 1943. Term No. 38 O. T. 1943, 39 O. T. 1943.